ABUL HASSAN BIN MOHD. RASHID & ANOR.

v.

TAN SRI DATUK IBRAHIM MOHAMAD & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-435-91]
12 OCTOBER 1992

PRACTICE AND PROCEDURE: Application for summary judgment - Whether there are triable issues - Application dismissed by SAR - Appeal to judge.

The plaintiffs action was based on non-payment of consultancy fees for services rendered to the defendants on various matters. The defendants denied that the plaintiffs had been appointed to deal with the three matters. The plaintiffs sought an order for leave to enter interlocutory judgment on liability and for damages to be assessed later which application was dismissed by the SAR.

Held:

[1] The exchange of correspondence made it certain that the first plaintiff had been appointed by the first defendant to sort out the three matters. There was no merit in the defendants allegation that they had never appointed the plaintiffs to deal with the matters.

[2] A trial was quite unnecessary on the question of liability but damages, also in the light of correspondence needed to be assessed.

[Judgment for the plaintiffs.
Damages to be assessed by SAR].

Cases referred to:

*Avel Consultants Sdn. Bhd. & Anor. v. Mohamed Zain Yusof & Ors. [1985] 2 CLJ 11 / [1985] 2 MLJ 209 (**refd**)*

*Way v. Latilla [1937] All ER 759 (**refd**)*

*Ngai Heng Book Binder Pte. Ltd. v. Syntax Computer Pte. Ltd. [1988] 2 MLJ 205 (**refd**)*

*Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 CLJ 627 / [1992] 1 MLJ 400 (**foll**)*

For the plaintiff - C.V. Das and N. Balan; M/s. Shook Lin & Bok

For the defendant - K. Rajkumari; M/s. Megat Najmuddin Leong & Co.

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

The plaintiffs, by summons in chambers filed on 4 July 1991, had applied for leave to sign final judgment against the defendants for RM2.5 million, interest on the said sum at 8 per cent per annum from 6 November 1989, until full settlement, an order that they be given leave to enter interlocutory judgment for damages to be assessed later, and costs. On 12 February 1992, the learned Senior Assistant Registrar had dismissed the said application with costs.

As pleaded in the statement of claim, the plaintiffs' action was for the nonpayment of consultancy fees for services rendered to the defendants for three matters, namely for the Cheras property at Grant 463 Lot 13 Section 57 District of Kuala Lumpur as regards the conversion from leasehold to freehold title, for the Hicom Industrial Valley Sdn. Bhd. (hereinafter "HIV") matter in respect of procuring a buyer for the defendants' 49 per cent shareholding therein, and for the Pusat Bandar Damansara Sdn. Bhd. (hereinafter "PBD") matter also with regard to procuring a buyer for the defendants' twenty per cent shareholding valued at one hundred and twenty million ringgit then. The plaintiffs contend that they had to do a lot of Government liaison work, negotiate and discuss with the relevant authorities and obtain results on behalf of the defendants in these dealings and were therefore entitled to be paid by them for their efforts and disbursements.

As for the work done, the plaintiffs had been successful as regards the Cheras property resulting in it being marketable and conducive for development with its value enhanced. The HIV shares had also been sold at increased prices ranging from RM8 to RM25 per square foot to numerous Japanese investors and UDA was considering the purchase of the PBD shares.

It is trite law that in summary judgment applications like this, the only thing for the Court to consider is whether there are any triable issues. I had pondered over the able arguments of learned Counsel for both parties and had perused the affidavits, annexures and authorities but could not find any on liability.

First, there is the letter from the first defendant to the Prime Minister dated 22 December 1987. It is clear that he was then in financial difficulties and was seeking the Prime Minister's help in the

three matters mentioned as his earlier letter dated 29 September 1987 to the Chief Secretary to the Government on the same three matters had met no success. What is important in the letter to the Prime Minister is that he had stated in the last paragraph that he had appointed the first plaintiff to negotiate and discuss the said matters with the relevant agencies.

By an earlier letter dated 4 December 1987, the first defendant had in fact written to the first plaintiff as regards the PBD shares and the last paragraph reads "Grateful if you could assist to dispose off my interest. Price can be negotiated and I have informed YAB Prime Minister of my intention to dispose to which YAB offers no objection."

In his letter to the Chairman of UDA on the same shares dated 28 December 1987, the first defendant has stated "In this connection, I have authorised Encik Abu Hassan bin Mohd. Rashid of RAH Holdings Sdn. Bhd. to act as my representative with full authority to discuss and negotiate with your goodself."

Then there is the letter dated 15 January 1988 to the Prime Minister on the same three matters which is signed by both the first defendant and the first plaintiff as adviser. This illustrates that they were handling the matters together. The letter from the first plaintiff to UDA dated 22 February 1988 on the PBD matter makes no doubt of the fact that some action had in fact been taken by the first plaintiff.

By letter dated 26 October 1989 from the first plaintiff to the first defendant, the first plaintiff had stated that he had expended a lot of time and money on entertainment and various payments for and to prominent personalities in charge of or connected with solving the three projects and since the Cheras property had been successfully converted from leasehold to freehold and the HIV shares sold with only the PBD matter pending, the first plaintiff had asked for payment for the work done. It is necessary and relevant to reproduce the reply from the first defendant:

> Tan Sri Datuk Ibrahim Mohamed
> P.S.M., P.S.D., S.P.D.K., D.P.M.K.
>
> 6 November 1989
>
> Encik Abul Hasan Bin Mohd Rashid
> Rah Holdings Sdn Bhd
> No. 28, 4th Floor,
> Jalan 1/82B
> Bangsar Utama
> Bangsar
> 59000 Kuala Lumpur
>
> Dear Sirs,
> Thank you for your letter dated 26 October 1989, and would be grateful if you could kindly indicate the basis on which the fees are to be computed that is, consultancy time basis or performance basis so as to arrive at an amicable settlement.
>
> Wassalam.
>
> Yours faithfully,
> (signature)

This was followed by three letters from the first plaintiff to the first defendant dated 13 November 1989, 7 December 1989 and 8 January 1990, the first suggesting a few proposals as regards the computation for payment and the second and third being reminders. All three letters met with no response. By letter dated 8 March 1990 to the first defendant, the first plaintiff had suggested a fee of RM2.5 million. This was followed by a letter from the plaintiffs' solicitors dated 26 July 1990 to which the first defendant had replied denying that he had agreed to pay the said amount.

To my mind, the exchange of correspondence has made it certain that the first plaintiff had been appointed by the first defendant to sort out the three matters and so there cannot be any dispute as to the appointment of the first plaintiff by the first defendant.

The Supreme Court quite recently in *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400 had made it clear that -

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

In the instant case, from the correspondence referred to and based on the affidavits of both parties, I can find no merit in the defendants'

allegations that they had never appointed the plaintiffs to deal with the matters.

In this connection, my view was that a trial was quite unnecessary on the question of liability but damages, also in the light of the correspondence, need to be assessed. Accordingly, I had allowed the plaintiff's appeal with costs on liability and ordered judgment in favour of the plaintiffs. However, as for quantum, I had directed that damages are to be assessed by the learned Senior Assistant Registrar on a date to be fixed.

CITIBANK N.A.

v.

CHOONG KOK MIN AND ABDUL GHAFAR BIN BABA & 4 ORS. (THIRD PARTIES)

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-867-90]
6 OCTOBER 1992

PRACTICE AND PROCEDURE: Application for summary judgment - Final judgment entered against defendant before SAR - Appeal - Whether triable issues raised.

The plaintiff as a member of a consortium of bankers and financial institutions, extended term loans and banking facilities to a company called India-Malaysia Textiles Bhd. (the borrower).

On 14 January 1984, the plaintiff assigned all its rights, title and interest in all the secured and unsecured debts due and payable by the borrower to the assignee in return for a consideration of RM13.7 million. A joint and irrevocable guarantee dated 14 April 1984 was executed by 4 guarantors, including the defendant, whereby they agreed to indemnify the plaintiff for all loss suffered in the event of default of the assignee in failing to fulfill its obligations under the deed of assignment.

The assignee failed to pay the balance consideration and the plaintiff brought proceedings to enforce the guarantee against the defendant.

The defendant appealed against the decision of the SAR granting leave to enter final judgment and raised three issues in an attempt to set aside the summary judgment:

(1) Whether there was good consideration given for the guarantee.
(2) Whether it is equitable to proceed against one guarantor.
(3) Whether the assignment is enforceable.

Held:

[1] There was a prior arrangement that the guarantee was to be executed after the execution of the assignment and it could not be said that the consideration was past purely based on the time when the guarantee was executed.

[2] The principal debtor is the assignee and at the time the guarantee was executed, the benefit still accrued to the assignee. Since the lapse of time had been agreed to by all the parties, there